Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

LYNN ANN STEIRER, a Minor, by BARBARA and THOMAS STEIRER, as Guardians and in Their Own Right; DAVID STEPHEN MORALIS, a Minor, by THOMAS and BARBARA MORALIS, as Guardians and in Their Own Right,

Petitioners,

v.

BETHLEHEM AREA SCHOOL DISTRICT; THOMAS J. DOLUSIO; ELLEN PAGANO; BARBARA HUTH; JOSEPH McCARTHY; JOHN SPIRK, SR.; RUTH PROSSER; URIEL TRUJILLO; LAWRENCE KISSLINGER; LYNN GLANCY; ROBERT THOMPSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

WILLIAM H. MELLOR III
*CLINT BOLICK
DIRK G. ROGGEVEEN
SCOTT G. BULLOCK
Institute for Justice
1001 Pennsylvania Avenue, NW
Suite 200 South
Washington, DC 20004
(202) 457-4240
Counsel for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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1. Respondents quite remarkably contend that petitioners are asking this Court to issue an advisory opinion about the constitutionality of community service programs. Br. in Opp. 6-8. To determine whether a case involves an advisory opinion, "the question in each case is whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment [as opposed to an advisory opinion]." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The dispute in this case plainly satisfies this standard. The parents and students challenging the mandatory community service program are presently subject to its requirements. Indeed, the students' successful completion of high school hangs in the balance due to the school board's refusal to allow students to opt out of a program that violates fundamental constitutional liberties. The potential withholding of publicly provided education is clearly of sufficient "immediacy and reality" to satisfy the test of whether a "substantial" controversy exists in the instant case.

2. Respondents seek to diminish the distinction between slavery and involuntary servitude drawn by the plain language of the Thirteenth Amendment by arguing that "not every kind of forced work or labor falls within the ambit of the phrase 'involuntary servitude'; only those forms akin to African slavery rise to this level." Br. in Opp. 9. Respondents ignore, however, that the "contours of slavery have shifted since the enactment of the Thirteenth Amendment. [citations omitted] No longer is the slave always black and the master white." *United States v. Lewis*, 644 F. Supp. 1391, 1400 (W.D. Mich. 1986).

Recently, the prohibition against involuntary servitude contained in the Thirteenth Amendment has been extended to such situations as patients in mental hospitals and juveniles in youth centers. *See, e.g., Downs v. Dept. of Public Welfare*, 368 F. Supp. 454 (E.D. Pa. 1973); *King v. Carey*, 405 F. Supp. 41 (W.D.N.Y. 1975). Throughout its contemporary manifestations, the definition of involuntary servitude has remained constant: "a condition of enforced compulsory service of one to another." *Hodges v. United States*, 203 U.S. 1, 16 (1906). The mandatory community service program administered by respondents aptly fits this definition by requiring students to "provide services to the community without receiving pay" in order to obtain a high school diploma. *Steirer v. Bethlehem Area School District*, 987 F.2d 989, 991 (3d Cir. 1993) (App. 4).

Respondents attempt to liken the services required by the community service program to other types of labor held by this Court not to constitute involuntary servitude. Br. in Opp. 9-11. In *United States v. Kozminski*, 487 U.S. 931, 944 (1988), this Court recognized two situations in which coerced labor does not amount to involuntary servitude: (1) the performance of certain "public" duties, such as compulsory military service or roadwork, and (2) "exceptional" cases well established in the common law at the time of the Thirteenth Amendment's passage, such as laws preventing contracted sailors from deserting their ships. Respondents' mandatory community service program does not fall within either of these exceptions to the prohibition on involuntary servitude.

The beneficiaries of respondents' community service program are community service organizations that receive the benefit of free labor or, as respondents claim,

the students themselves (presumably, even those who object to participation in the program). Either way, the program does not constitute one of the "civic" exceptions recognized by this Court whereby the beneficiary of the program is the general public through such endeavors as the defense of the nation or the building of public roadways. Furthermore, the community service program is not one of the common law "exceptions" to the prohibition on involuntary servitude, but rather closely resembles a contemporary, more subtle form of servitude described in *Lewis*.

In describing the make-up of the mandatory service program (Br. in Opp. 10), respondents focus on the nature of the tasks performed under the program, most notably the "option" of tutoring other students in order to fulfill the requirements of community service. Under Thirteenth Amendment analysis, however, the inquiry is not focused on the nature of the work performed, but rather on the penalties or consequences of not performing the required services. *Kozminski, supra; United States v. King*, 840 F.2d 1276, 1280-81 (6th Cir. 1988). Indeed, many tasks performed by individuals conscripted into servitude or even slavery were of a relatively benign nature, such as serving as a butler or house musician. Likewise, in the instant case, though the work performed may be benign, the consequence of not performing mandatory community service is the withholding of the most important public benefit an individual can obtain: a high school diploma.

The sole reason given by respondents as to why mandatory community service does not constitute involuntary servitude is that students have the option of either quitting the public schools or completing high school, but not graduating. Br. in Opp. 13. In comparing mandatory

community service for public high school students to training requirements for such professionals as attorneys and teachers, respondents ignore several vital distinctions between career choices of adults and the "options" faced by non-majority age public high school students. Clearly, the choices faced by adults deciding to enter into a career and thereby accepting certain obligations are quite distinct from a minor facing the prospect of participating in a required program that violates his fundamental beliefs or being denied publicly provided education.

The "options" offered by respondents for students who object to mandatory participation in community service are further restricted by Pennsylvania's compulsory school attendance laws that apply to at least half the students in respondents' school district who are subject to the program and can not quit school without facing legal penalty. *See* 24 Pa. Cons. Stat. §§ 13-1327, 13-1333, 13-1343. Furthermore, unlike adults who can presumably participate in democratic processes for determining occupational requirements, students subjected to coerced mandatory service, because they are below the age of majority, did not participate in the crafting of the program and can not even object to it at the ballot box. Despite these circumstances, students are forced to make a Hobson's choice wherein they submit to the requirements or they are denied educational opportunities.

Apart from the lack of any practical or feasible alternatives offered to students who object to mandatory community service, the "options" presented by the school district to preserve the voluntariness of the program can not withstand judicial scrutiny. If the sole measurement of the degree of voluntariness is the option of discontinuing education at respondents' schools, then the school

district could require virtually any "service" and students could not state a claim under the Thirteenth Amendment.

For instance, under respondents' analysis, the school district could institute a program that would require students to perform manual labor on a new addition to the school or perhaps the private homes of the school directors. This program could be justified on the basis that the educational goals of the program were for students to learn good work habits or important construction skills with only incidental benefits going to either the school district or public officials. Furthermore, respondents could not distinguish this hypothetical program from the current community service plan on the basis that mandatory community service offers students a "plethora of different types of service from which to choose." Br. in Opp. 10. Petitioners' objection to mandatory community service lies not with inadequate service options, but rather with its coercive and involuntary nature.

Therefore, under the Thirteenth Amendment analysis urged upon this Court by respondents, students could be drafted into any type of servitude the school district deemed appropriate and could not claim that it was involuntary because they could always quit school or continue school and not receive a diploma. Respondents' argument and the lower court's adoption of it drains the Thirteenth Amendment of any meaning as it applies to public school students and merits review by this Court.

3. Respondents also fail in their defense of the court of appeals' holding that mandatory community service as applied to petitioners does not constitute compelled affirmance of belief in violation of the First and Fourteenth Amendments to the United States Constitution. In support of the court of appeals' ruling, respondents argue

that petitioners can not state a claim under the First Amendment because community service is not expressive conduct protected by the First Amendment. Br. in Opp. 17-22. Normally, service in the community, like other activities such as standing, sleeping, or walking, would not display the necessary expressive elements to give rise to a First Amendment issue. *See City of Dallas v. Stanglen*, 490 U.S. 19, 25 (1989).

In the instant case, the mandatory nature of the community service program, in addition to the surrounding statements made by school officials as to why participation in the program is required, constitutes expressive activity under the First Amendment. As this Court recognized in *Clark v. Community Center for Creative Non-Violence*, 468 U.S. 288 (1984), while sleeping is not usually associated with expressive conduct, sleeping in a public park in order to protest homelessness changes the nature of the conduct and thereby brings the conduct within the ambit of the First Amendment. Likewise, while standing is not usually considered protected First Amendment activity, a requirement that individuals stand while the Pledge of Allegiance is being recited also raises First Amendment considerations. *See Lipp v. Morris*, 579 F.2d 834, 836 (3d Cir. 1978). The school district claims that coerced community service does not constitute expressive activity because students can voice opposition to the notion of community service and that individuals who see students performing community service would not normally perceive their actions as supporting coerced community service. Br. in Opp. 18. Both defenses are unpersuasive under this Court's First Amendment jurisprudence.

Suppose respondents instituted a program to raise student consciousness about the homeless by decreeing that all students must spend a night outdoors in a public park and sleep alongside the homeless. In support of this mandatory program, the school district devised several educational objectives, including the goal that all students be made aware of this societal problem and understand their responsibilities in addressing this issue.[1] Students who objected to the school district's program of mandatory overnight stays in public parks could publicly state their opposition to the program or do so in written evaluation forms. Furthermore, individuals who see the students sleeping alongside the homeless may either perceive them as students fulfilling graduation requirements or even as genuinely homeless. Nevertheless, such a mandatory program and the activity of sleeping outdoors would doubtless raise serious constitutional questions if individual students objected to the school districts' beliefs about homelessness and did not want to sleep outdoors in order to become better acquainted with the issue. The mandatory community service program in the instant case is no different in degree or kind from the hypothetical program presented and likewise brings what would not normally be expressive activity within the protection of the First Amendment.

In demonstrating the ideological nature of the mandatory community service program, respondents object to

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[1] Compare the objectives of this hypothetical program to two of the objectives of the mandatory community service program: "f. To give students a sense of appreciation of the worth of community organizations; g. To help students understand their responsibilities as citizens in dealing with community issues." *Steirer*, 789 F. Supp. 1337, 1339 (E.D. Pa. 1992) (App. 32).

the use of statements by public school officials supporting the adoption of the program. Br. in Opp. 14-15.[2] When determining whether school officials act in accordance with constitutional guarantees, it is proper to examine the statements and "value-laden" comments made by school officials and others when the program at issue was debated. *Pratt v. Ind. Sch. Dist. No. 831, Forest Lake*, 670 F.2d 771, 777 (8th Cir. 1982) (upholding a district court's use of transcripts of two public meetings to deduce a school board's reasons for its decision); *see also Board of Education v. Pico*, 457 U.S. 853 (1982). Respondents in the instant case revealed their explicitly ideological reasons for supporting the concept of mandatory community service. *See* App. 54-61. Of course, the school directors have a First Amendment right to make such statements. However, respondents went on to require that all students act in accordance with those beliefs by mandating community service for all students in direct contravention to petitioners' sincerely held belief that efforts to help others must be voluntarily chosen.

Although school officials have wide latitude in determining the content of educational programs, those programs must comport with constitutional guarantees. *See Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("the vigilant protection of constitutional freedoms is nowhere more

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[2] Respondents also object to the characterization of the community service program as setting limits as to what types of organizations can be involved in the program. Br. in Opp. 18-19. While it is true that a student does not have to work for an organization and can instead participate in an "experiential" program, if a student does wish to work for an organization, it must be "free from doctrinal motivation," among meeting other qualifications. *Steirer*, 987 F.2d at 991 (App. 5).

vital than in the community of American schools"). In *Lee v. Weisman*, 112 S.Ct. 2649, 2658 (1992), this Court exercised particular sensitivity to freedom of conscience for school children by recognizing "heightened concerns for protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools." Rejecting school officials' arguments that prayers at graduation ceremonies were not coercive because students did not have to attend the ceremony or could leave during the prayer, this Court noted that

> the government may no more use social pressure to enforce orthodoxy than it may use more direct means. . . . Attendance may not be required by official degree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.

Weisman at 2659.

In the instant case, the school officials do not even employ the subtle pressure illustrated in *Weisman*. Instead, the "direct" means of enforcing orthodoxy by respondents is explicitly threatening to withhold a high school diploma for students who, by the dictates of their own conscience, will not participate in coerced community service. Br. in Opp. 13. This blatant conditioning of the receipt of the most tangible and important benefit conferred by the state upon the forfeiting of First Amendment rights raises serious constitutional questions. *See Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977); *Perry v. Sinderman*, 408 U.S. 564 (1972).

CONCLUSION

Petitioners have sought from the initiation of this litigation merely to opt out of a program that violates fundamental constitutional liberties. Respondents' program denies petitioners their Thirteenth Amendment right to be free from involuntary servitude and their First Amendment right to be free from compelled affirmance of belief. Furthermore, respondents' program is typical of similar programs at an increasing number of public schools throughout the country in which clear constitutional parameters have yet to be determined. For the foregoing reasons and those previously stated in the petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

WILLIAM H. MELLOR III
*CLINT BOLICK
DIRK G. ROGGEVEEN
SCOTT G. BULLOCK
Institute for Justice
1001 Pennsylvania Avenue, NW
Suite 200 South
Washington, DC 20004
(202) 457-4240
Counsel for Petitioners

*Counsel of Record

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